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In The

Supreme Court of the United States

October Term, 1995

General Motors Corporation,

Petitioner,

v.

Jack French, Robert M. West, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS JACK FRENCH, *ET AL.*

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QUESTION PRESENTED

Should this Court grant review to consider an appellate court order remanding a proposed class action settlement for further proceedings based on that court's determination that (a) the district court must make the findings required by Federal Rule of Civil Procedure 23 prior to certifying the class, and (b) there were serious problems with the fairness of the settlement that had to be resolved before it could be approved?

PARTIES TO THE PROCEEDING

Respondents who were appellants below and who appear in this Brief in Opposition are Jack French, Robert West, Charles Merritt, Gary Blades, Betty Youngs, Barbara Phillips, Margaret Engel, Larry Swope, Robbin Maxwell, the Center for Auto Safety, Tracey Best, Dawn Best, John Yonki, Connie Yonki, John Southards, Mary Southards, Betty E. Marteny, Jackie Barnes, Gary Barnes, Morris Betzold, Barbara Betzold, Dallas Nelson, Patricia Nelson, Carl V. Corona, Kathryn Corona, Dale W. Plummer, Mildred Duncan, Edmond Berning, Rudolph Jenkins, William D. Cunningham, Mather Johnson, Forrest Charles Ginn, Buren William Jones, and Martin D. Parkman.

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BRIEF IN OPPOSITION OF RESPONDENTS JACK FRENCH, *ET AL.*

This case involves consolidated class actions brought on behalf of owners of General Motors ("GM") trucks that are prone to deadly accidents because their gas tanks are located *outside* the truck frame, thus lacking protection from collisions. The complaint sought an award of either damages or a "retrofit" to fix the vehicles. Shortly after these cases were consolidated, and before a class was certified or any

substantial formal discovery was taken, a proposed settlement was reached between petitioner and a purported class of truck owners in every state but Texas, where an identical settlement, limited to Texas truck owners, was simultaneously reached. Although both settlements provided a $1,000 coupon toward the purchase of a new truck sold by petitioner, neither provided *any* of the relief sought in the complaint.

Respondents are class members and a national automotive safety organization who objected to the proposed settlement on the ground that it would provide most class members with nothing of value, while allowing the safety hazard to go unabated. Without even considering whether this case could be maintained as a class action under Federal Rule of Civil Procedure 23, the district court approved the settlement. The court of appeals reversed. It held that the district court should have determined whether this case could be properly maintained as a class action and remanded it for that purpose. To provide guidance for the settling parties and the district court in the event that a class could be certified, the court of appeals explained that, aside from class certification issues, the coupon settlement was unfair because it discriminated among different segments of the class and because the aggregate value of the coupons to the class had been wildly inflated by class counsel's marketing expert. On this point, the decision below closely resembles that of the Texas Court of Appeals — cited nowhere in the petition — which had earlier rejected the Texas coupon settlement, *Bloyed v. General Motors Corp.*, 881 S.W.2d 422 (Tex. App.), *review granted*, No. 94-0777 (Tex. S.Ct. Feb. 16, 1995), saying that it appeared to be simply a marketing bonanza for GM.

STATEMENT OF THE CASE

A. The Evidence Concerning GM's Defective Trucks.

This action was brought to address the worst fire-related vehicle safety hazard in history. Because petitioner installed the fuel tanks outside the frame rail of its truck, the tanks are vulnerable to rupture in crashes. Over 400 people have been killed and 2,000 badly burned in side-impact crashes involving these trucks. Third Circuit Joint Appendix ("JA") 1860. The National Highway Traffic Safety Administration ("NHTSA") has noted that the fatality rate in GM crashes, where fire is the primary cause of death, is more than three times as great as it is for Ford and Dodge trucks, whose fuel tanks are located inside the frame rails. JA 1861, 2095.

The evidence shows that GM deliberately decided to place the gas tanks outside the frame for marketing reasons. The original 1964 design plan for the pickups placed the fuel tank near the center of the vehicle. By 1973, petitioner's marketing department decided that it wanted to equip the trucks with much larger gas tanks as a "sales consideration," but, as a GM engineer explained in another lawsuit, these larger tanks could not be placed inside the rails. JA 1948-49.

Soon after the side-saddle trucks went on the road, petitioner discovered that a significant number of them were involved in fiery crashes. In June 1974, a GM study of accident reports also concluded that 1973 pickups with side-saddle tanks had more fuel leaks than had pre-1973 pickups. The vulnerability of these tanks was confirmed in a 1978 GM study, and a September 7, 1978 internal GM memorandum concluded that at least 19% of side impact accidents involved the potential for high fuel leakage from side-mounted tanks and that moving the tanks inside could eliminate most of these potentially dangerous leaks. JA 1863.

From 1981 to 1983, GM conducted secret side-impact crash tests on its trucks because its counsel had determined that the trucks were "no longer defensible." JA 1863. GM's engineer Ronald Elwell, who had previously testified for GM in litigation involving its truck fuel tanks, discovered that the side-saddle tanks ruptured in those tests. JA 1953. Despite this evidence, GM failed to make any alterations until model year 1988, when it finally moved the gas tank inside the frame.

B. Preliminary Proceedings in the District Court.

The consolidated class action complaint sought an order remedying this defect by requiring GM to recall the trucks or to pay for their repair. JA 37, 93. Those remedies would have allowed GM truck owners to continue using their trucks, while addressing the safety problem at no expense to the truck owners and at little expense to GM. And they would have diminished the danger of explosion and fire to GM truck owners.

Before the district court had an opportunity to rule on petitioner's opposition to class certification, and before the parties turned to formal discovery on the existence of a defect, class counsel and petitioner reached a settlement. Under it, petitioner agreed to issue $1,000 certificates to class members, valid only within the next 15 months, towards the purchase of a new GM truck or van. In return, class counsel abandoned any relief designed to remedy the safety defect in the existing trucks. The terms of the settlement are more fully described in Part C below.

Notice was sent to the class under Rules 23(c)(2) and 23(e), informing the class about both the pendency of the class action and the proposed settlement. While the notice informed the class that counsel might seek an award of attorney's fees, it did not provide any information about the amount of the request. At that time, the district court

provisionally certified the class for settlement purposes only, but it made none of the findings required by Rules 23(a) or 23(b) as to whether the class action could be properly maintained. *See* JA 1828-1833.

Without providing a period of time for the objectors to take discovery of class counsel or petitioner, the district court held a fairness hearing, which consisted of oral argument by counsel and by some individual truck owners proceeding *pro se*, but no live testimony by expert or fact witnesses. On December 16, 1993, the district court issued an opinion and order approving the settlement and rejecting class members' objections (113a-146a), which are more fully described below. The court still made none of the findings required by Rule 23 to determine whether class certification was appropriate. Four days later, without holding a hearing, the district court approved class counsel's request for $9.5 million in attorney's fees, plus expenses, relying entirely on the fact that petitioner had not objected to the fee request (even though it had retained the right to do so in the settlement agreement). JA 1770-72, 160a. The class members had not been given notice about this $9.5 million figure, nor had the objectors even been served with class counsel's fee application. The district court reaffirmed its approval of the award of attorney's fees in a superseding order filed February 3, 1994, stating that it had independently reviewed the fee request and found it to be reasonable. JA 1775, 1784-85.

C. The Settlement and Objections Thereto.

The core of the settlement is a certificate with a face value of $1,000, good only towards the purchase of a new GM truck or van ("Original Certificate")(156a). The Original Certificate is valid for only 15 months, and may be used only by the owner or by members of the owner's immediate family residing at the same address (157a). Moreover, petitioner will not simply send the Original

Certificates to the owners of record; rather, the truck owners must request them from GM. *See* 159a. Furthermore, the cheapest model to which the coupons apply costs $11,000, and the average base price of a new GM truck is $19,208. JA 1888-89. Thus, to take advantage of the coupon, class members would have to commit to spending a large amount of money on the purchase of a new truck.

If the current owner or a family member living at the same address is unable to use the Original Certificate to purchase a new GM truck, the options are even more limited. First, although a GM truck owner who sells his or her truck may transfer the Original Certificate along with the truck to the new owner (156a), that option is nearly useless since most purchasers of a used GM truck would not also be in the market for a new one. Second, the settlement agreement allows owners to designate a family member living outside the household as the recipient of the Original Certificate (157a). However, that designation had to made by October 19, 1993, with a notarized statement from the class member. As of that date, only about 0.8% of the class had elected that option. JA 1898-99.

Third, truck owners can theoretically transfer their rights under the settlement to other persons by returning their Original Certificates to GM and requesting that GM issue a different, Non-Transferable Certificate to another person, who must be named in a notarized statement. These Non-Transferable Certificates, have a face value of only $500, and, unlike the Original Certificates, may *not* be used in conjunction with any GM marketing incentive. They are valid only towards the purchase of the more expensive, full-size GM trucks, and they expire when the Original Certificates expire, despite the considerable delay that the transfer procedure entails. *See* 158a-159a. Because of these restrictions, the settlement is essentially worthless to class

members who cannot afford to, or choose not to, purchase a new GM truck.[1]

Respondents' experts submitted affidavits supporting the nearly self-evident proposition that the requirement of a substantial outlay of cash makes it unlikely that many consumers will ever use the coupons. For example, Dr. Paul Bloom, who has studied a similar coupon-based settlement in antitrust litigation involving the sale of real estate in Maryland, testified that, in that litigation, "certificate owners did not want to spend money on another house just to use their certificates," JA 1908, and that the same would be true for the purchase of motor vehicles. Jack Gillis, a marketing expert, former NHTSA official, and author of the best-selling consumer guide to motor-vehicle purchases, explained that the cost of new GM trucks was so high that the coupons were insignificant, especially when compared to the many marketing incentives offered by GM for its trucks. JA 1889-91.

GM and class counsel did not dispute that many class members would be unable to afford a new truck; indeed, class counsel's marketing expert, Dr. Itamar Simonson, performed a telephone survey of class members and concluded that only 45%-49% of the class would obtain any value from the coupons or, put differently, that a majority of the class would obtain nothing for releasing their claims. JA 2234. Since only 14% of those surveyed stated that they would definitely or probably purchase a new truck, JA 2218,

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[1] In addition, numerous objecting state and local governments stressed that they owned fleets of trucks and, because of fiscal pressures and competitive bidding cycles, could not possibly redeem a substantial number of their certificates and purchase new trucks within the 15-month redemption period. Some of these governmental entities, who also objected on the ground that use of the coupon mechanism would be illegal under their competitive bidding procurement statutes, are filing a separate Brief in Opposition in this Court.

2244, Dr. Simonson relied primarily on the certificate's supposed transferability.

The evidence presented to the district court, however, demonstrated that Dr. Simonson's predictions about the transferability of the coupons were wildly overstated. Theoretically, truck owners can give the coupons to family members who reside at the same address, and could have written to GM to designate a non-resident family member as the recipient. Yet this transfer right is worthless to the governmental and other entities — so-called "fleet owners" — who own as many as 40% of the trucks and do not have a "family member" that would qualify (JA 1889). Moreover, as noted above, only **0.8%** of the class had contacted GM to request a transfer, even though Dr. Simonson's survey predicted that **36%** of the class — which Dr. Simonson then arbitrarily discounted to 14-16% — would transfer their certificates to family members. JA 1899.[2]

Further, by offering incentives on new trucks, petitioner can render the $500 certificates worthless. This is hardly speculation since petitioner offered incentives for new trucks from January 1, 1992 through April 25, 1993, JA 1891, and direct manufacturer incentives are typically worth $500 to $2,000 (JA 1885), more than the face value of the Non-Transferable Certificate.[3]

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[2] The number of remaining class members that might still transfer their Original Certificates to resident family members is likely to be very small, since, on average, there are only 1.79 persons of driving age (including spouses) per household, JA 1899, and the small percentage of survey respondents who said they would buy a new truck with the Original Certificate probably would have taken into account other adult family members living in their homes.

[3] The Certificate Clearing Corporation ("CCC"), the country's leading firm in the business of trading certificates issued in litigation settlements, refused to handle the GM certificates because of the

(continued...)

Aside from problems related to the coupon's value, the proposed settlement was fundamentally flawed because it made no provision for fixing the vehicles or for monetary recovery to allow class members to make necessary repairs, even though the trucks' safety problem was the focus of the complaint. The settling parties' principal rejoinder was that no available retrofit would solve the safety-related problems. In this regard, the most disturbing aspect of the district court proceedings is that class counsel introduced no evidence to indicate that they had made any independent investigation concerning a retrofit. As a result, the dispute over the availability of a retrofit was contested entirely by GM and the objectors, with class counsel remaining on the sidelines.

Respondents submitted affidavits showing that at least three technologically feasible options were available to improve the safety of GM trucks at relatively low cost: installing a protective metal cage or high-density polypropylene shield used to protect fuel tanks on other vehicles, *see* JA 1926, 1929; relocating the fuel tank inside the rail, JA 1922, which is precisely what petitioner did *after* the 1987 model year; and installing new tanks containing liners, which would lessen the amount of fuel spilled should rupture of the tank occur. JA 1926. According to petitioner's own documents, the company previously considered all three options and found that each would enhance the safety of the fuel tank systems on the pickups. JA 1863-64.

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[3](...continued)
insuperable barriers to transfer. As the court of appeals noted (83a), an organization such as CCC could not assist in making a market for the coupons because the Non-Transferable Certificate must irrevocably be made out to the ultimate truck purchaser, not an intermediary. JA 1931-1936.

D. The Decisions Below.

The district court did not make any findings under Rules 23(a) and (b) that this case could be maintained as a class action, but simply tentatively certified a class for settlement purposes before sending out notice to the class, and then confirmed that order when it approved the settlement. As to the merits, the district court applied the test enunciated by the Third Circuit in *Girsh v. Jepson*, 521 F.2d 153 (1975), and approved the settlement, relying principally on Dr. Simonson's survey results, and its conclusion that the plaintiff class could not prove damages because the trucks' "Blue Book" values had not dropped vis-a-vis their competitors (124a).

The court of appeals reversed in an opinion by Judge Edward Becker. It dealt first with several threshold legal issues concerning "settlement class actions," *i.e.*, putative class actions in which the defendant and the self-appointed lawyers for the class reach a proposed settlement before a class has been certified by the district court. The court of appeals explained that, because the district court is deprived of critical information about the class' claims and potential intra-class conflicts, settlement class actions pose a serious potential for abuse, in which class counsel may trade the rights of the absentee class members for a healthy fee (35a-38a). On the other hand, the court of appeals acknowledged the benefits of settlement classes, particularly their ability to efficiently dispose of large numbers of claims (41a-42a), and concluded that, in appropriate circumstances, settlement class actions are cognizable under Rule 23 (50a).

The court of appeals made two additional rulings to insure the protection of the absent class members. First, it found that, while it is permissible for the parties to reach settlement prior to class certification, formal certification findings under Rule 23 must be made at some point in every class action (50a-51a). As a part of this ruling, Judge Becker also held that the approval of a settlement under Rule 23(e)

may not serve as a surrogate for a class certification ruling in which the court finds that the prerequisites of Rule 23(a) and one portion of Rule 23(b) have been met. Focussing his attention on Rule 23(a)(4)'s adequacy of representation requirement, Judge Becker noted that, "[w]ithout determining that the class actually was adequately represented, the district judge has no real basis for assuming that the negotiations satisfactorily vindicated the interests of all absentees." 56a.[4]

Second, the court held that settlement classes must meet the same standards for class certification that apply to cases that have not settled (61a). The court relied on the language of the Rule, which contains no "separate, liberalized criteria for settlement classes" (59a-60a), this Court's decision in *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982)("actual, not presumed, conformance with Rule 23(a) remains...indispensable"), and the potential for abuse in settlement class actions. In addition to its previously expressed concerns about adequacy of representation, the court held that a failure to apply Rule 23(a)'s commonality and typicality requirements in nationwide cases such as this one, would "pervert[] the class action process and convert[] a federal court into a mediation forum for cases that belong elsewhere, usually in state court" (61a).

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[4] In a passage particularly apropos to the settlement here, Judge Becker noted (56a):

> To state that class members were united in the interest of maximizing over-all recovery begs the question. Although that observation might allay some concern about conflict between the attorney and the class, a judge must focus on the settlement's distribution terms (or those sought) to detect situations where some class members' interests diverge from those of others in the class. For example, a settlement that offers considerably more value to one class of plaintiffs than to another may be trading the claims of the latter group away in order to enrich the former group.

The court then considered whether, despite the district court's failure properly to certify the class, Rule 23(a)'s requirements could be met on the present record. The court acknowledged that there was numerosity (63a). As to typicality and commonality, however, the court noted that, given the potential differences among claims and defenses in this nationwide class action in which the laws of all 50 states applied, the district court must consider those requirements on remand (63a).[5]

The court also held that a finding of adequacy of representation under Rule 23(a)(4) could not be sustained because class counsel had ignored significant intra-class conflicts, in particular that the fleet owners would never enjoy the benefit of transferring certificates to "family members," and that the value of the transfer option was greatly reduced because of other barriers to the creation of a secondary market (64a).

In questioning class counsel's adequacy, the Third Circuit also discussed the problems surrounding the $9.5 million attorney fee request for "little work" (69a), which it perceived as clouding class counsel's judgment to serve every segment of the class (65a-72a). The court was particularly concerned about counsel's failure to include in the class notice even an estimate of the fee amount to be sought, which it saw as an attempt to ward off opposition to both the fee and the proposed settlement (69a & n.24). The court also questioned the settling parties' pledges that a deal had not been struck on fees as part of the settlement, in light of GM's "lay down" position in court even though the fee application contained obvious inadequacies (70a-72a). Thus, the court of appeals remanded the case to the district court to

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[5] The court left open the possibility that these concerns could be met, perhaps through subclassing, if the claims and defenses broke down into a handful of identifiable groups, as was the case in *In re School Asbestos Litig.*, 789 F.2d 996, 1010 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986). *See* 61a n.23.

allow the settling parties to augment the record on the class certification issue and, then, for the district court to determine whether the case could be maintained on a class basis (72a).

Finally, because of the possibility that the case might be certified on remand, the court of appeals reviewed the settlement under its *Girsh v. Jepson* factors. It found that the settlement was not a fair, adequate, and reasonable compromise of the class members' claims, noting that its analysis was similar to that of the Texas Court of Appeals in rejecting the parallel Texas settlement (76a). The court's key findings include:

(a) The settlement discriminated against class members "of lesser financial means" who could not afford to buy a new truck (79a);

(b) Dr. Simonson's methodology was fundamentally flawed. When his survey revealed that only 14% of owners would "definitely" or "probably" buy a new truck, he added another 23% of the class members who said only that they "may or may not buy" a new truck, JA 2244, and then discounted his findings by arbitrary amounts (78a);

(c) The fleet owners were badly shortchanged because they could not replenish their fleets in the short redemption period, nor could they be assured, because of competitive bidding laws, of being able to use the coupons at all (81a);

(d) The district court "presumed development of a liquid market" for transfer of the certificates "with very little support in the record..." (83a). Dr. Simonson "gave *no* explanation" for his statement that each class member could sell her certificate for $250 or why a rational person would pay cash for a certificate without having it in hand, which would be necessary during the cumbersome transfer process (82a); and

(e) The district court erred in rejecting out of hand the possibility that class members could obtain repair relief, particularly in the form of a "fund to finance retrofits" (87a),

especially because petitioner itself had found the three repair options championed by the objectors to "enhance the safety of the fuel systems" (85a).

REASONS FOR DENYING THE WRIT

In the pages that follow, we show that the circuit courts are not divided on either of the questions presented in the petition. Before doing so, however, we address two threshold reasons why this case presents a particularly poor vehicle for reviewing those issues.

First, although the court of appeals was required to consider the class certification issue before reaching the merits, there is no doubt that this settlement between petitioner and class counsel will not survive no matter how the certification question is resolved. The court of appeals found the settlement to be unfair on a number of grounds, many, if not all, of which will be unaffected by a ruling on the legal issues presented in the petition. Thus, the class certification issues raised in the petition are unlikely ever to affect the class members or petitioner. Further, the court of appeals' legal rulings will not burden petitioner, but rather the plaintiff class members, who have *not* sought review in this Court even though they will be unable to proceed with their lawsuit unless they can meet Rule 23's class certification requirements. The special circumstances of this remand order underscore the wisdom of this Court's practice not to review interlocutory rulings absent exceptional circumstances. *See* R. Stern, et al., *Supreme Court Practice* 195-98 (7th ed. 1993); *Virginia Military Institute v. United States*, 113 S. Ct. 2431, 2432 (1993)(opinion of Scalia, J., respecting the denial of certiorari); *cf. Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

Second, the Advisory Committee on Civil Rules is currently considering a sweeping revision to Rule 23. *See* Proposed Amdts. to Rules of Civil Procedure, Rule 23 (on file at Committee on Rules of Practice, Admin. Office of

U.S Courts, Washington, D.C.). The current draft would collapse Rules 23(b)(1)-(3), expand the criteria for class certification under subdivision (a), and alter the settlement approval requirements in Rule 23(e) and its advisory committee note. Because any opinion the Court might issue may not survive the amendment process, this Court should deny review and allow that process to run its course.

A. There is No Circuit Split on the Question Whether Settlement Class Actions Must Meet Rule 23 Requirements.

1. Petitioner argues that the decision below parts company with four circuit courts on the question whether settlement class actions may avoid meeting the class certification criteria of Rule 23. We note first that the Third Circuit did not, as petitioner asserts (Pet. 18), knowingly foster a circuit split. The court of appeals said only that "despite some courts' *suggestions* that the standards are less rigorous for settlement classes, we do not believe that Rule 23 authorizes separate, liberalized criteria for settlement classes" (57a)(emphasis added). A *suggestion* of a somewhat different standard does not constitute a circuit split. The court of appeals' principal disagreement was with a treatise writer (59a) — the late Herbert Newberg — and that disagreement does not call for this Court's review.

In any event, the decisions pointed to by petitioner do not support the proposition that Rule 23's certification requirements can be ignored for settlement classes. In *In re Dennis Greenman Securities Litig.*, 829 F.2d 1539 (11th Cir. 1987), a settlement was set aside because the class had been certified under the wrong subsection of Rule 23(b). While the court adverted in dicta to a "special standard" used in reviewing "settlement certifications," it stated that "*this case is meaningfully different*," because "the district court certified a class action prior to the commencement of settlement negotiations." *Id.* at 1543 (emphasis added).

Moreover, in direct contrast to the position urged by petitioner, the Eleventh Circuit held that "[t]he prerequisites of Rule 23(a) must be satisfied," along with "one of the subsections to Rule 23(b)...." *Id.* at 1544 & n.5.[6]

Neither *Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982), nor *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195 (5th Cir. 1981), is on point. *See* Pet. 18. In neither case did the persons challenging the settlement even raise the question whether the criteria for certifying settlement classes are less stringent than for litigation classes. Indeed, in *Officers for Justice*, an employment discrimination action, the district court had certified the case *for litigation* under Rule 23(b)(2) for back pay and injunctive and declaratory relief, and under Rule 23(b)(3) for damages, and the class members were given the right to opt out at that time. The objector did not opt out and then complained that a later-achieved settlement did not give him *another* chance to do so. The Ninth Circuit simply held that neither the Rule nor due process demanded that class members "be given a second chance to opt out." *Officers for Justice*, 688 F.2d at 635. Similarly, *Corrugated Container* did not involve a challenge to class certification at all, and the Fifth Circuit had no occasion to consider the Rule 23 criteria. Rather, the main challenge in *Corrugated Container* was to the fairness of the monetary terms of the settlement, and, on that score, the Fifth Circuit remanded the case for further findings by the district court. 643 F.2d at 212-21.

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[6] Indeed, in *Greenman*, "[n]one of the parties challenge[d] the district court's holding that [the Rule 23(a)] prerequisites were satisfied." 829 F.2d at 1544 n.5. The district court in *Greenman* understood the necessity of making Rule 23(a) and (b) findings, as it did so in advance of the settlement *and again* as part of the settlement approval process. *In re Dennis Greenman Securities Litig.*, 622 F. Supp. 1430, 1444 (S.D. Fla. 1985); *In re Dennis Greenman Securities Litig.*, 94 F.R.D. 273, 276-78 (S.D. Fla. 1982).

Finally, petitioner relies on *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989), a mass-tort personal-injury class action involving the claims of 300,000 plaintiffs against the insurer of a bankrupt medical device manufacturer, in which class certification was sought under the non-opt-out provisions of Rule 23(b)(1)(A), not Rule 23(b)(3), the Rule applicable here. *Robins* did *not* decide whether the Rule 23 criteria apply differently to a settlement class. To the contrary, its class certification discussion begins by noting that a class action "must satisfy all *four* steps of the prerequisites mandated by subsection (a) of the Rule. ... Assuming qualifications under (a) have been met, the next step demands that the action fit within at least one of the three categories of actions identified in subsection (b) of the Rule." 880 F.2d at 727-28 (emphasis in original).

Robins' main focus was on whether mass-tort class actions can be maintained at all under Rule 23(b). In upholding class certification, the court described what it viewed as a growing acceptance of mass-tort class actions (whether for litigation or settlement), 880 F.2d at 729-40, a point not related to the questions presented here and with which the court of appeals below agreed (29a). Although *Robins* stated in dicta at the very end of its discussion that "settlement should be a factor" in class certification, *id.* at 740, it did so in the context of noting that settlement class actions are permissible under Rule 23, *id.* at 738, a point with which the court of appeals below concurred (50a).

2. Petitioner also criticizes the court of appeals' holding that a finding that a settlement is fair may not serve as a surrogate for Rule 23 findings (*see* 50a-57a), asserting that the holding conflicts with decisions of the Second and Fifth Circuits. The Third Circuit did disagree with a "suggestion" from one opinion that a notice of a proposed settlement to the class members implies that Rule 23's requirements have been satisfied (52a). But that "suggestion" says nothing about whether settlement approval under Rule 23(e) can be a surrogate for certifications findings under Rule 23(a) and

(b), and the two cases upon which petitioner relies — *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983), and *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677 (7th Cir. 1987) — do not stand for that proposition. *See also* 51a (there "appears to be no authority contra th[e] practice" of requiring Rule 23 findings for settlement classes).

In *Weinberger*, the only question presented was whether "the absence of class certification *prior* to the notice of the settlement is ... an absolute bar to approval," *i.e.*, whether settlement classes are permissible at all. 698 F.2d at 73. *Weinberger*, like the court below, held that settlement class actions are permissible, and that case does not hold — or even suggest — that a finding of fairness can serve as a substitute for class certification. Indeed, the Second Circuit's principal holding — that settlement classes require a "clearer showing of a settlement's fairness, reasonableness and adequacy" than do "cases ... where a class has been certified and class representatives have been recognized at an *earlier date*," *id.* (emphasis added) — strongly suggests that certification findings must be made at some point in every class action.

Similarly, *Mars* did not hold that a fairness finding substitutes for certification findings under Rules 23(a) and (b). Indeed, in *Mars*, Judge Posner lamented the fact that the district judge did not make a "formal determination" under Rule 23, 834 F.2d at 680, and focused, as had *Weinberger*, on the question whether settlement classes are permissible at all. *Id.* at 681. As in *Weinberger*, the court discussed "the practice of *deferring* class certification until a settlement has been negotiated," *id.* (emphasis added), thus strongly implying that class certification — and not simply a finding of fairness — is required at some juncture in every class action. *See also id.* (agreeing with *Weinberger* "that when class certification is *deferred*, a more careful scrutiny of the fairness of the settlement is required"). In short, no

circuit court has ever held that a fairness finding under Rule 23(e) obviates the need to certify a proper class.

3. The decision of the court of appeals is consistent with the language of the Rule and decisions of this Court. First, as the court of appeals held (59a-60a & n.22), the language of the Rule does not admit of separate, liberalized criteria for settlement class actions. The Rule states simply that "[a]n action may be maintained as a class action if the [four] *prerequisites* of subdivision (a) are satisfied, and in addition" one of the parts of subdivision (b) is met. Fed. R. Civ. P. 23(b)(emphasis added). Moreover, subsection (e) notes only that "[a] class action" — presumably the "class action" referred to in subsection (b) — "shall not be ... compromised without the approval of the court ...." This language strongly supports the view that *all* "class actions," including settlement class actions approved under Rule 23(e), must meet the requirements of Rules 23(a) and (b).

This straightforward interpretation of the Rule gains support from *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982), an employment discrimination class action in which this Court held that a Mexican-American employee, who was denied a workplace *promotion*, could not properly represent a class of Mexican-American job *applicants*. Although *Falcon* did not involve a settlement class, the Court's admonition that "actual, not presumed, conformance with Rule 23(a) remains...indispensable[,]" 457 U.S. at 160, was not in any way restricted to class actions that were to be litigated rather than settled. Thus, in rejecting certification, the Court noted that a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161; *see* 57a.

Further, petitioner's claim that Rule 23(e) settlement approval eliminates the need for class certification cannot be squared with *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). There, the named plaintiffs argued that they should be excused from giving the class members notice and opt-out

rights under Rule 23(c)(2) — which apply in 23(b)(3) class actions — because "adequate representation, rather than notice, is the touchstone of due process in a class action...." *Id.* at 176. "[T]his view has little to commend it," this Court held, because "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *See also id.* at 176 n.13 (class members' opt-out rights also protected). So too here, petitioner may not pick and choose which portions of Rule 23 are applicable. Rather, the members of the class are entitled to the protections of Rule 23(e) *and* Rule 23(a), in which the adequacy of representation requirement discussed in *Eisen* plays a critical role.[7]

Finally, although petitioner complains of the Third Circuit's class certification requirement and yearns for "liberalized" or "lower standards," Pet. 18, the actual contents of such lower standards are conspicuously absent. Petitioner does not say that, in a settlement class action, there need not be "questions of law or fact common to the class," Fed. R. Civ. P. 23(a)(2), or that it should be permissible for class representatives to hold claims that are *not* typical of the class. Fed. R. Civ. P. 23(a)(3). And petitioner dares not argue that, in settlement class actions, there is a less demanding adequacy of representation requirement under Rule 23(a)(4), especially in light of the holdings in both *Weinberger* and *Mars* — two cases relied upon by petitioner — which strongly suggest that the need for adequacy is *heightened* in a settlement class action precisely because the settlement negotiations have taken place prior to the court's finding that there is a proper class. Finally, petitioner does not argue, nor has any court ever

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[7] Petitioner argues that, because the class members here were given the right to opt-out, there was no need to satisfy the certification requirements of Rule 23(a) and (b). Pet. 20. Under *Eisen*, however, class members in a Rule 23(b)(3) action are entitled to notice and opt-out rights *and* the protections that class certification affords.

held, that a class action may be maintainable, contrary to Rule 23(b)(3), where individual issues predominate over common questions of law and fact, just because the named parties have agreed to settle.[8] In short, because the decision below is consistent with the language of Rule 23 and its purposes, review should be denied.

B. There is No Circuit Split on the Standards for Reviewing Class Action Settlements.

Petitioner's second claimed basis for review is an alleged divergence in standards among the circuits concerning the standards for reviewing class action settlements under Rule 23(e) — an issue that is of no significance unless the class was properly certified. Because the Rule itself contains no substantive standards for court approval, the circuits have not surprisingly used somewhat different language in evaluating such settlements. However, petitioner's characterization of a widening disagreement among the lower courts is not borne out by the case law.

1. The "universally applied standard" under Rule 23(e) is whether the settlement is fair, adequate, and reasonable. *Officers for Justice*, 688 F.2d at 625. Petitioner asserts, however, that there is a substantial difference in the "degree of deference to the trial court that different Circuits afford in applying the test," Pet. 24, and that the Third, Fifth, and Eleventh Circuits are "hamstringing a district court's authority to approve settlements...." Pet. 26. In reality, the standards in the Third, Fifth, and Eleventh cases are very similar to the standards employed in cases petitioner cites

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[8] Under Fed. R. Civ. P. 23(b)(3)(D), the fact that a case has settled might be deemed relevant to "the difficulties likely to be encountered in the management of a class action." Taking the limited question of manageability into account is, however, true to the language of the Rule and does not seek to avoid the class certification requirements in any way.

from assertedly more "deferential" circuits, invoking what petitioner describes as "wide discretion in assessing the weight and applicability of these factors," Pet. 24, and according a district court's ruling "considerable deference." Pet. 22.[9] Indeed, one of the cases relied upon by petitioner, *Weinberger v. Kendrick*, 698 F.2d at 63, adopted the Third Circuit's standard in *Ace Heating and Plumbing Co. v. Crane Co.*, 453 F.2d 30 (1971), with the caveat that *additional* scrutiny should be applied in reviewing settlement class actions.

2. Nor is there any meaningful divergence of authority on the particular factors to be applied in evaluating class settlements. As occurred in this case, courts in the Third Circuit often look to the nine-factor test laid down in *Girsh v. Jepson*, 521 F.2d 153. To be sure, the court of appeals reviewed the settlement carefully, as has been held universally to be appropriate where settlement is achieved prior to class certification. *See* 74a (citing circuit court authority, including several cases upon which petitioner relies). However, the Third Circuit has not applied *Girsh* in a manner that distinguishes it from other circuits, and indeed, it has frequently opined that each factor is not relevant in every case, a position which petitioner extols (Pet. 24-25). In

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[9] *See, e.g., Georgevich v. Strauss*, 772 F.2d 1078, 1085 (3d Cir. 1985)("The District Court has considerable discretion in determining whether a settlement is fair and reasonable, and its determination will be reviewed only for abuse of discretion")(internal quotation omitted); *Girsh*, 521 F.2d at 156 (same); *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956 (3d Cir. 1983)("[g]reat weight is accorded [the] views [of the trial judge] because he is ... on the firing line and can evaluate the action accordingly")(quoting *Ace Heating and Plumbing Co. v. Crane Co.*, 453 F.2d 30, 34 (3d Cir. 1971)); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982); *Salinas v. Roadway Express, Inc.*, 802 F.2d 787, 789 (5th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987); *Ibarra v. Texas Employment Comm'n*, 823 F.2d 873, 879 (5th Cir. 1987); *Leverso v. Southtrust Bank of Al., Nat. Assoc.*, 18 F.3d 1527 (11th Cir. 1994).

Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118 (3d Cir. 1990), for example, the court approved a post-verdict settlement, cited the *Girsh* factors, but then noted that some were "inapposite" on the particular facts of the case. The court examined the response of the class to the settlement, and the "ratio which the reasonableness of the settlement bears to the possibility of success on the merits of the appeal." As a practical matter, this analysis is the same as that employed by circuits which petitioner purports to favor, *i.e.*, "the expected value of their claim if it went to trial, net of the costs of trial," Pet. 22, and hardly represents the rigid, inflexible application of *Girsh* of which petitioner complains.[10]

Nor do the Fifth and Eleventh Circuits apply overly restrictive tests. In the leading case of *Parker v. Anderson*, 667 F.2d 1204 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982), the court looked to six factors, and adopted a standard employed by the Ninth Circuit — a circuit that petitioner claims is properly deferential — which grants "[b]road discretion... [to the] trial judge, enabling him or her to respond fluidly to the varying needs of particular cases." *Id.* at 1209 n.5 (quoting *Mendoza v. United States*, 623 F.2d 1338, 1344 (9th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981)); *see also id.* at 1209 ("we share the view of our colleagues of the Second, Fourth and Eighth Circuits that, absent fraud or collusion, the most important factor is the probability of the plaintiff's success on the merits"); *Leverso v. Southtrust Bank of Al., Nat. Assoc.*, 18 F.3d 1527, 1531 (11th Cir. 1994).

In sum, while Rule 23(e) itself provides little guidance, the circuits have done remarkably well in establishing

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[10] *See also, e.g., Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1311 (3d Cir. 1993); *Walsh v. Great Atlantic & Pacific Tea Co., Inc.*, 726 F.2d 956, 966 (3d Cir. 1983); *Shlensky v. Dorsey*, 547 F.2d 131, 147 (3d Cir. 1978).

uniform standards for evaluating class action settlements. Although not stated in identical terms, each standard requires the district court to compare the value of the settlement against the value of the claims, and provides the district courts with the flexibility that is the hallmark of Rule 23. *Falcon*, 457 U.S. at 160. It has been suggested that Rule 23(e) be amended to give district courts more specific guidance, *see* Hon. William Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 Corn. L. Rev. __ (forthcoming 1995)(proposing 11-factor amendment to Rule 23(e)), but that decision is up to the Rules Committee in the first instance, which may want to consider the issue as part of its general review of Rule 23 which is now underway. Meanwhile, there is no support for petitioner's claim that the circuits are split on the standards for evaluating class action settlements, and therefore review should be denied.

C. The Court of Appeals Did Not Inappropriately Substitute Its Judgment for That of the District Court.

The petition (at 26-29) ends with a misleading charge that, in evaluating the fairness of the settlement, the court of appeals improperly substituted its judgment for that of the district court. Aside from its inaccuracy, this portion of the petition is peculiar for two related reasons. First, petitioner does *not* seek review on that ground. *See* Pet. i, 4. Thus, even if that highly idiosyncratic issue were worthy of review, it is not properly before this Court. *See* S.Ct. Rule 14.1(a).

Second, contrary to petitioner's assertion, the court of appeals understood the proper standard of review, which it set out at the beginning of its discussion (25a-26a), and several times thereafter (*e.g.*, 71a, 76a, 86a). At other points, the court of appeals, while not using the magic words "clearly erroneous" or "abuse of discretion," made plain its belief that the district court's factual findings had little or no

basis in the record.[11] Thus, petitioner is left with the argument that the court of appeals misapplied the appropriate legal standard to the facts of the proposed settlement, which is not an issue worthy of a place on this Court's limited docket.

In any event, the court of appeals correctly rejected the district court's findings on many issues. Rather than review them all, we take up the four issues seized upon by petitioner (Pet. 27-29), and show that the court of appeals correctly disposed of each. **First**, petitioner attempts to buttress Dr. Simonson's statement that the $500 transfer certificates could be sold by each class member for $250 (with $250 going to the buyer), but, as the court of appeals explained (82a), Dr. Simonson gave *no* basis for this conclusion, nor did he account for transaction costs, which would have to be borne by someone. Moreover, contrary to petitioner's assertion (Pet. 27), there was abundant evidence that a secondary market would *not* develop for several reasons: less than 12% of those surveyed said that they would even *try* to transfer the coupon; petitioner could render the $500 coupon worthless through its pervasive rebate and credit offers; and the nation's leading coupon-trading company refused to handle the coupons. *See* JA 1931-36, 2244.

Second, as to the risk of establishing liability, the court of appeals correctly noted that the district court overlooked important matters (95a-96a). For instance, it was by no

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[11] *See, e.g.*, 77a (district court "ignored the fact" that coupons had no cash value and did not address safety problems); 78a-79a (class counsel's marketing expert used "arbitrary factors" to discount survey responses); 81a (district court's dismissal of fleet owners' objection "far too cavalier"); 82a (marketing expert "gave *no* explanation" for his "assumption" that class members could sell certificates for $250)(emphasis in original); 91a (after reviewing all evidence concerning reaction of the class, that "factor *plainly does not*, contrary to the district court's conclusion, weigh in favor of approving the settlement")(emphasis added).

means impossible to prove a product defect, as the district court believed, since a majority of personal-injury plaintiffs had prevailed in trials presenting the same issue, and the district court never considered numerous personal-injury settlements based on GM truck fires (96a). *See In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 U.S. Dist. Lexis 3507, *17, *32 (E.D. La. 1995)(disapproving nationwide vehicle defect putative class action settlement in significant part because settlement amounts in personal-injury cases were substantial). In addition, the district court's belief that *some* class members in *some* jurisdictions might face insuperable defenses could not, as a matter of law, be employed to the detriment of class members in other jurisdictions where such obstacles did not exist (96a).

Third, as to the risk of establishing damages, the court of appeals was disturbed by the district court's extremely truncated consideration of this issue (124a). The district court did not address the fact that the principal measure of damages under the Uniform Commercial Code for breach of warranty would be the cost of repair (97a-98a), and thus it erred in considering only the lack of proof of damages based on Blue Book values. Moreover, cost of repair was a viable measure of damages, the court of appeals held, particularly because petitioner itself tested the three retrofits proposed by objectors and found that each would improve safety.

Finally, petitioner challenges the court of appeals' ruling that inadequate discovery was taken by class counsel. But the court of appeals correctly stated that "*nothing* in the record demonstrates that [class counsel] had conducted significant independent discovery or investigations to develop the merits of their case..., that they had retained their own experts, or that they deposed a significant number of the individuals implicated" in the other cases that they had reviewed (92a)(emphasis added). In particular, the court of appeals pointed out that class counsel did not depose Ronald Elwell, a former General Motors employee who had

extremely helpful information, particularly on the question of retrofit (92a, 86a).

With respect to the Elwell testimony, petitioner derisively states that the court of appeals "apparently was unaware" of a state court injunction purporting to bar Elwell from testifying in any case involving a General Motors product. Pet. 29. The court of appeals was plainly aware of the injunction. *See* 120a n.4; Brief of Appellee General Motors Corporation, at 23 & n.10, *in In Re: General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, No. 94-1064, *et al.* (3d Cir. Apr. 25, 1994). More to the point, as *petitioner* is painfully aware, but did not disclose to this Court, almost every court to have ruled on the issue — to our knowledge, involving at least 20 cases — has refused to give the Elwell injunction full faith and credit.[12] Thus, the court of appeals was correct that Mr. Elwell should have been pursued more vigorously in this action.

* * *

The district court never found that this class action met the requirements of Rules 23(a) and (b), and yet it approved a settlement dismissing all of the class' claims in exchange for coupons of dubious value which do nothing to alleviate the safety problem that forms the core of this lawsuit. Even then, the court of appeals did not dismiss the possibility that a settlement which treats all segments of the class fairly could go forward, and thus it remanded the case to allow the

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[12] *See, e.g., Williams v. General Motors Corp.*, 147 F.R.D. 270 (S.D. Ga. 1993); *Meenach v. General Motors Corp.*, 891 S.W.2d 398 (Ky. 1995); *Shoemaker v. General Motors Corp.*, No. 91-0990-CV-W-8, slip. op. at 6-15 (W.D. Mo., June 18, 1995); *Worden v. General Motors Corp.*, No. 18127-4-II, slip. op. at 2-5 (Wash. Ct. App., May 20, 1994). Indeed, the principal law firm representing petitioner in this case has recently defended a deposition of Mr. Elwell over petitioner's objection that the injunction barred Elwell's testimony. Dep. of Ronald Elwell (Jan. 16, 1995), in *Delarosa v. General Motors Corp.*, No. 90G2176 (Dist. Ct., Brazoria Cty., Tex.).

district court to determine whether the class could be certified under Rule 23 and, if so, whether this or some other settlement was fair, adequate, and reasonable. Further consideration in the district court, not review by this Court, is most likely to bring a just end to this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

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